No. 11,902

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FREEMAN STEAMSHIP COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission,

Appellee.

Upon Appeal From the District Court of the United States for the Southern District of California Southern Division.

BRIEF FOR WARREN H. PILLSBURY, DEPUTY COMMISSIONER.

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WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission,

Appellee.

BRIEF FOR WARREN H. PILLSBURY, DEPUTY COMMISSIONER.

Jurisdiction.

This proceeding was brought by appellants under Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1436, as amended, 33 U. S. C. 921(b), to set aside a compensation order issued by Warren H. Pillsbury, Deputy Commissioner [Ap. 3-49]. Final order dismissing the libel was entered by the District Court on January 7, 1948 [Ap. 224]. Notice of appeal and petition for appeal were filed on March 17, 1948, the appeal being allowed by an order entered March 18, 1948 [Ap. 225, 228, 229]. The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended, 28 U. S. C. 225(a).

Questions Presented.

1. Whether in an injunction proceeding brought under Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act to set aside a compensation award as being not in accordance with law, the plaintiff is entitled to a trial *de novo* on the issue as to whether the claimant is the widow of the deceased employee.

2. Whether the District Court erred in ruling that the compensation order is in all respects in accordance with law.

3. Whether the order of the District Court dismissing the libel deprives appellants of their property without due process of law in violation of the Fifth Amendment.

Statute Involved.

Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, Sec. 21(b), 44 Stat. 1436, as amended, 33 U. S. C. 921(b)), provides in pertinent part:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district Court of the United States for the District of Columbia if the injury occurred in the District.) * * *"

Statement of the Case.

Cora E. Olcott filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424, as amended, 33 U. S. C. 901 *et seq.,* on account of the death of her husband, Walter Olcott, on November 12, 1944, which resulted from injuries he sustained while employed as a stevedore by the Freeman Steamship Company at San Diego Harbor, California [Ap. 56-57]. This claim was controverted by the employer and its insurance carrier, the Fireman's Fund Insurance Company, and hearings were duly held by Warren H. Pillsbury, Deputy Commissioner, on March 7, 1945, and May 23, 1945 [Ap. 59, 61-119, 125-157]. At these hearings the only issue as to which any contention is now made was the issue as to the relationship of the claimant to the deceased employee [Ap. 64-65, 66]. On February 18, 1946, the Deputy Commissioner entered a compensation order in which he found, *inter alia,* that the claimant "* * * is the widow of the deceased employee, Walter Olcott, was married to him on August 26, 1926, and was living with him as his wife and dependent upon him for support at the time of his injury," and awarded her a death benefit of $13.13 per week, plus $200 for burial expenses [Ap. 174-177].

On March 5, 1946, the Freeman Steamship Company and the Fireman's Fund Insurance Company filed a libel for injunction under Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C.

921(b), alleging that the award was not in accordance with law in that there is no evidence to sustain the finding that Cora E. Olcott was married to Walter Olcott [Ap. 3-49]. Deputy Commissioner Pillsbury answered denying the material allegations of the libel, alleging that the findings of fact in the compensation order complained of are supported by evidence and not subject to judicial review, and that the compensation order is in all respects in accordance with law [Ap. 50-52]. On October 25, 1946, a motion for summary judgment on behalf of the Deputy Commissioner was denied without prejudice to any further proceedings [Ap. 178-179, 208-209]. Thereafter, on June 26, 1947, libelants filed a motion to set the cause for trial and for a trial *de novo* on the issue as to whether the claimant was actually married to the deceased employee and was his surviving wife, on the ground that the relationship of the claimant to the deceased was a jurisdictional and basic fact [Ap. 210-211]. On January 7, 1948, the District Court denied libelants' motions and dismissed the libel on the ground that the compensation order was in all respects in accordance with law [Ap. 224]. This appeal followed [Ap. 225-229].

Summary of Argument.

I.

Appellants' contention that they were entitled to a trial *de novo* on the issue as to whether the claimant is the surviving wife of the deceased employee is not supported by *Crowell v. Benson,* 285 U. S. 22, on which they rely, as this is not a constitutional jurisdictional issue such as was involved in that case. In any event, the doctrine of trial *de novo* as to jurisdictional facts laid down in *Crowell v. Benson* no longer retains vitality in the light of later decisions by the Supreme Court.

II.

The Deputy Commissioner found that Cora E. Olcott is the widow of the deceased employee within the meaning of the Longshoremen's and Harbor Workers' Compensation Act. The evidence in support of this finding measures up fully to the quantum of proof necessary to establish a valid marriage in California, where the parties were domiciled. Since it is supported by evidence and is not inconsistent with law, this finding of the Deputy Commissioner is final and conclusive.

III.

Appellants' argument that the refusal of the Deputy Commissioner and the court below to require the claimant to show a legal marriage has deprived them of property without due process of law is merely another way of arguing that the evidence does not sustain the finding of a marriage by the Deputy Commissioner, which is discussed in the point next above. In so far as it embodies any other argument, it presents a contention which was not presented to the court below for decision, and hence may not be urged in this Court.

ARGUMENT.

I.

Appellants Were Not Entitled to a Trial De Novo on the Issue as to Whether the Claimant Is the Surviving Wife of the Deceased Employee.

Appellants contend that the principle of *Crowell v. Benson,* 285 U. S. 22, is applicable to the present case, and that in the light of that decision by the Supreme Court they are entitled to a trial *de novo* on the issue as to whether Cora E. Olcott is the surviving wife of Walter Olcott, the deceased employee [Br. 5-7). This contention is based on a mistaken interpretation of the opinion in that case.

Crowell v. Benson arose in the United States District Court for the Southern District of Alabama by the filing of a suit to enjoin the enforcement of an award made under the Longshoremen's and Harbor Workers' Compensation Act, which award was rested upon a finding by Crowell, the deputy commissioner, that the claimant was injured while in the employ of Benson and while performing service upon the navigable waters of the United States. Benson's complaint alleged that the claimant was not in his employ, and that the Longshoremen's Act was unconstitutional because it violated the due process clause of the Fifth Amendment, the provisions of Article III with respect to the judicial power of the United States, and other portions of the Federal Constitution. The district judge granted a hearing *de novo* upon the factual question of employment, expressing the opinion that the Act would be invalid if not construed to permit the court to hear and to consider all the facts. *Benson v. Crowell,* 33 F. (2d) 137, 142; 38 F. (2d) 306. The case was transferred to the admiralty docket, the fact of employ-

ment was put in issue by answers, and oral evidence of both parties was heard. The District Court decided that the claimant was not in the employ of Benson and restrained the enforcement of the award. This decree was affirmed on appeal. *Crowell v. Benson,* 45 F. (2d) 66 (C. C. A. 5).

The Supreme Court, with three justices dissenting, also affirmed, holding that the Longshoremen's and Harbor Workers' Compensation Act was constitutional only if it was construed to permit a trial *de novo* on what was said to be the basic, jurisdictional issue as to whether the relation of master and servant existed, and that the District Court did not err in permitting a trial *de novo* on that issue. *Crowell v. Benson,* 285 U. S. 22, 62, 64, 65. The Court also held by way of *dictum,* as the question was not involved, that the same rule applied to the question of whether the accident occurred upon navigable waters of the United States. *Id.,* 54-55, 64. The majority opinion made it clear that power in the District Court to grant a trial *de novo* as to these two issues was considered necessary because they were deemed to involve questions of constitutional right in that they determined the existence of the congressional power to create the liability prescribed by the statute. *id.,* 55-56. Thus, while the issues as to employment and locality of the injury are referred to as relating to "fundamental facts" or "jurisdictional facts," it is apparent that the Court meant "constitutional jurisdictional facts," *i. e.,* facts which bring the case within the field in which Congress has the constitutional power to legislate, as distinguished from "statutory jurisdictional facts," *i. e.,* facts which bring the case within the ambit of the statute as passed by Congress. See *Washington Coach Co. v. National Labor Relations*

Board, 301 U. S. 142, 147; *Shields v. Utah Idaho R. Co.,* 305 U. S. 177, 184; *Yakus v. United States,* 321 U. S. 414, 473 (dissenting opinion), Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932), 80 U. Pa. L. Rev. 1055.

It follows, therefore, that in order to bring this case within the principle of the *Crowell* decision, appellants must show here that the validity of the marriage determines the power of Congress under the Constitution to require the payment of compensation to the surviving wife of a longshoreman. Appellants have not suggested any reason why the validity of the marriage presents a constitutional issue. Certainly it has no more significance so far as constitutional rights are concerned than the question as to whether a parent was dependent on the deceased, and the Supreme Court has held that a finding of dependency by a deputy commissioner, if there is evidence to support it, is conclusive, and the District Court may not grant a trial *de novo* as to that issue. *L'Hote v. Crowell,* 286 U. S. 528. See *South Chicago Co. v. Bassett,* 309 U. S. 251, 258. Indeed, the Supreme Court has resisted all other efforts to add to the category of jurisdictional issues as to which a trial *de novo* may be had. *Voehl v. Indemnity Insurance Co.,* 288 U. S. 162; *Parker v. Motor Boat Sales,* 314 U. S. 244 (whether accident arose out of and occurred in the course of the employment); *Del Vecchio v. Bowers,* 296 U. S. 280 (whether death was suicide or accidental); *South Chicago Co. v. Bassett,* 309 U. S. 251 (whether employee was a crew member); *Marshall v. Pletz,* 317 U. S. 383, 388 (whether the claim was timely filed). The question as to whether the claimant is the widow of the deceased employee, like the issues

dealt with in the cases above cited, relates merely to the applicability of the Longshoremen's Act, and has no bearing whatever on the constitutional power of Congress in this field of legislation. There is nothing in *Crowell v. Benson,* therefore, to support appellants' demand for a trial *de novo.*

In any event, the doctrine of trial *de novo* as to jurisdictional facts laid down in *Crowell v. Benson,* 285 U. S. 22, no longer retains vitality in the light of later decisions by the Supreme Court. *Davis v. Department of Labor,* 317 U. S. 249, involved a claim made under a Washington workman's compensation statute by the widow of a workman who was drowned when he was knocked from a barge into the Snohomish River while helping to dismantle an abandoned drawbridge. The state statute provided compensation for employees such as decedent if its application could be made "within the legislative jurisdiction of the state." In that case the Washington Supreme Court held that the state could not, consistently with the Federal Constitution, make an award to the widow of a workman drowned in a navigable river. The Supreme Court of the United States reversed, relying principally upon the presumption of constitutionality in favor of a state statute in holding that this claim was within the jurisdiction of the state. In discussing the question as to whether the employment in which decedent was engaged was within the legislative jurisdiction of the state, the court said (317 U. S. at pp. 256-257):

> "Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency en-

> trusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U. S. C. §920, which provides that, in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker v. Motor Boat Sales, supra.*"

In view of the fact that the Supreme Court had previously held unconstitutional a state statute providing benefits for certain maritime employees,[1] the issue in the *Davis* case was undoubtedly a constitutional jurisdictional issue, so that the language quoted above indicates a complete recession from the position taken in *Crowell v. Benson,* 285 U. S. 22.[2] See, also, *Cardillo v. Liberty Mutual Insurance Co.,* 330 U S. 469, 474.

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[1]*Southern Pacific Co. v. Jensen,* 244 U. S. 205. See *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, and *Washington v. W. C. Dawson & Co.,* 264 U. S. 219.

[2]Two comments by Mr. Justice Frankfurter on *Crowell v. Benson* are significant. In his dissenting opinion in *Yonkers v. United States,* 320 U. S. 685, he said (p. 595): "* * * The opinions in *Crowell v. Benson,* 285 U. S. 22, and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction."

Again, in a concurring opinion in *Estep v. United States,* 327 U. S. 114, Mr. Justice Frankfurter said (p. 142): "This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of 'jurisdictional fact.' In view of the criticism which that doctrine, as sponsored by *Crowell v. Benson,* 285 U. S. 22, brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose. * * *"

II.

The Deputy Commissioner's Finding That Cora E. Olcott Is the Widow of the Deceased Employee Is Supported by Evidence and Is Therefore Final and Conclusive.

The Deputy Commissioner in the compensation order complained of found the facts with reference to the employee's marital status to be as follows [Ap. 176]:

> "That Cora E. Olcott, claimant herein, born February 27, 1879, is the widow of the deceased employee, Walter Olcott, was married to him August 26, 1926, and was living with him as his wife and dependent upon him for support at the time of his injury. * * *"

The following is a reference to so much of the testimony taken at the hearings before the Deputy Commissioner as is considered sufficient to show that the above-mentioned finding of fact is supported by evidence:

Cora E. Olcott testified at the hearing on March 7, 1945 that she was married to the deceased, Walter Olcott, on August 26, 1926, at Tijuana, Mexico [Ap. 67, 113], and continued to live with him until his last illness [Ap. 67]; that they had no children and were never divorced; that she is 65 years of age; that she does not have a marriage certificate [Ap. 68]; that she had the papers but has since misplaced them [Ap. 132]; that they were not married in a church; that the deceased made all the arrangements; that some Spanish individual and his wife acted as witnesses to the ceremony [Ap. 113]; that these witnesses were acquaintances of the deceased [Ap. 114]; that the deceased had been well acquainted in Tijuana for some time [Ap. 128]; that after the ceremony she received a

certificate written in both English and Spanish, that is, the names were in English; that she has since misplaced the certificate; that she went to Tijuana, Mexico, in search of the record, but has been unable to locate it; that she inquired at the Government office at Tijuana and was told by the officials that they could not find the record; that such officials did not tell her whether they ever had such record, but did say they could not find the record then; that since 1926 she lived with the deceased as his wife, publicly and honorably [Ap. 114-115].

At the hearing on May 23, 1945, before the deputy commissioner Mrs. Olcott testified that many other persons could not find such records at Tijuana [Ap. 129]; that she could not find the place at which they had been married, but that at the time she was married there were a number of places where persons might be married [Ap. 129]; that the ceremony took place in a little bureau of some kind where people go to get married and there were others getting married at the same time [Ap. 131].

It was stipulated at the hearing on May 23, 1945, that other witnesses if called would testify that the claimant and deceased lived together and conducted and deported themselves as husband and wife for many years [Ap. 154].

John Roberts testified at the hearing on March 7, 1945, that he had known Mr. and Mrs. Olcott for 19 or 20 years, having been very intimate friends, and having worked with Mr. Olcott for many years; that prior to the time that they were married, Mr. Olcott came to him and told him that he (Olcott) was going to get married; that Mr. Olcott laid off a week and was married; that he then returned with his wife and resumed residence in San

Diego; that shortly afterwards Mr. Olcott came by the witness' house with Mrs. Olcott and took both the witness and his wife to see the house they intended to rent; that Olcott showed him the marriage license, and he noted that it was a marriage license in the Spanish language; that this took place about 18 years ago, and since that time Mr. and Mrs. Olcott have lived together as husband and wife, and have introduced themselves as such [Ap. 116-119].

In as much as the Olcotts were unquestionably domiciled in California at the time of Walter Olcott's death, it is entirely proper to weigh the evidence as to the validity of their marrirage in accordance with the law of California. *Travers v. Reinhardt,* 205 U. S. 423, 440. Section 57 of the Civil Code of California provides:

> "Proof of Marriage.—Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases."

Section 1963 of the California Code of Civil Procedure provides in pertinent part:

> "Disputable Presumptions.—All other presumptions are satisfactory if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:
>
> * * * * * * * *
>
> 30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage; * * *"

It is settled law in California that under Section 57 of the Civil Code parties to or persons present at the solemnization of a marriage may testify to the fact within their knowledge that such marriage actually took place, and when to such testimony there is added evidence that since the marriage the parties thereto have deported themselves as husband and wife, thus raising the presumption under Section 1963(30) of the Code of Civil Procedure that they have entered into a lawful contract of marriage, a *prima facie* case has been established. *Budd v. Morgan,* 187 Cal. 741, 744, 203 Pac. 754; *In re Morgan,* 106 Cal. App. 602, 603, 289 Pac. 647. Where such evidence had been offered, the finding of a state administrative board that it was insufficient to prove marriage was set aside, the court holding that the fact that deceased had stated he regarded marriage as "a slip of paper" and that no record of the marriage was produced was merely negative evidence, not touching the question of the sufficiency of the evidence adduced sustaining the marriage between the parties. *Landsrath v. Industrial Acc. Com.,* 77 Cal. App. 509, 514-516, 247 Pac. 227. Even the fact that the marriage certificate was not recorded is not sufficient to destroy such a *prima facie* case. *Krizman v. Industrial Acc. Com.,* 14 Cal. App. (2d) 419, 422, 58 P. (2d) 405.

The presumption of a lawful marriage arising from proof that a man and woman have deported themselves as husband and wife is not only evidence in itself, but it may, in certain cases, outweigh positive evidence adduced against it. *Estate of Chandler,* 113 Cal. App. 630, 633, 299 Pac. 110. See *Smellie v. Southern Pac. Co.,* 212 Cal. 540, 549, 299 Pac. 529; *People v. Chamberlain,* 7 Cal. (2d) 257, 260, 60 P. (2d) 299; *Khoury v. Barham,* 85 Adv. Cal. App. 295, 305, 192 P. (2d) 823.

California courts have not distinguished between marriage in Mexico and marriages in other jurisdictions, so far as the quantum of proof necessary to establish a *prima facie* case is concerned.[3] In *Estate of Chandler,* 113 Cal. App. 630, 299 Pac. 110, the court sustained the validity of a Mexican marriage in circumstances strikingly similar to those in the instant case. There an issue was raised in a probate proceeding as to whether property acquired by the decedent between the time of his marriage in Mexico in 1909 and a subsequent marriage ceremony observed by the same parties in 1918, should be classed as community property. This question turned, of course, on the validity of the Mexican marriage. The widow testified that she was married to decedent on November 22, 1909 in Tijuana, Mexico. She described the ceremony in considerable detail and testified that at the time of the ceremony a marriage certificate was given to the decedent; that after they had returned to her mother's home in Los Angeles she introduced decedent as her husband and he showed the marriage certificate to her mother; and that after spending the night at her mother's home they went to San Bernardino, where they lived together as man and wife until her husband's death almost

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[3]*MacArthur v. Industrial Acc. Com.,* 220 Cal. 142, 29 P. (2d) 846, cited by appellants (Br. 20), is distinguishable from the cases cited above and does not lay down any special rule for proving foreign marriages. There the claimant did not rely on a ceremonial marriage, so that she could be aided by the presumption in favor of the validity of a marriage ceremony arising upon proof that a ceremony was performed. Instead, the claimant relied on a common law marriage entered into in Canada, and there is no presumption as to the validity of a common law marriage. *Bolin v. Marshall,* 76 F. (2d) 668 (C. C. A. 9), also cited by appellants (Br. 20), is similarly distinguishable, as there the claimant relied on a common law marriage contracted in Oregon.

twenty years later. No record of the marriage could be found in Tijuana, and it does not appear that the marriage certificate was produced at the trial. In sustaining the validity of this marriage the court said (113 Cal. App. at 633):

> "* * * It seems to be settled in this state that a party to a marriage may testify as to its solemnization (sec. 57, Civ. Code; *Estate of Richards,* 133 Cal. 524 [65 Pac. 1034]; *Budd v. Morgan,* 187 Cal. 741 [203 Pac. 754]; *Landsrath v. Industrial Acc. Com.,* 77 Cal. App. 509 [247 Pac. 227].) Under the circumstances here shown there is a strong presumption that this was a legal marriage (subd. 30; sec. 1963, Code Civ. Proc.). In *Wilcox v. Wilcox,* 171 Cal. 770 [155 Pac. 95, 97], the court quotes with approval from Bishop on Marriage and Divorce, as follows:
>
> " 'Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality,—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of presumption, the truth of law and fact that it is illegal and void.' "

That decision was followed in *Estate of Crawford,* 69 Cal. App. (2d) 609, 160 P. (2d) 65, where the evidence showed that the parties, who were residents of Los Angeles, had gone to the office of a Mr. Soriano in Tijuana, Mexico, had signed papers and answered certain questions, and then had paid $23.00 to Mr. Soriano, who pronounced them man and wife. Two weeks later they received by mail papers which showed a proxy marriage in Juarez,

Mexico, based upon the appearance of the parties at Tijuana and their nomination of proxies. The court held that even without the record of the proxy marriage, the testimony as to the marriage ceremony in Tijuana and subsequent cohabitation was sufficient to raise the presumption that the marriage was valid and legal.

To rebut the presumption of a valid marriage based on Section 1963(30) of the California Code of Civil Procedure and the evidence of a marriage ceremony followed by more than eighteen years cohabitation as man and wife, appellants rely on evidence as to the Mexican law relating to marriages which, they contend, establishes requirements for a valid marriage wholly inconsistent with the claimant's testimony (Br. 10-19). However, the probative value of the evidence relied on is very doubtful. Jesus Ruiz, a lawyer from Tijuana who testified as an expert witness on Mexican law, stated that "six months of actual residence and doing business" in Tijuana by both parties was a requirement of a valid marriage, but he admitted on cross-examination that at least three-fourths of all the marriages recorded in Tijuana for 1926 involved people who had come over the border from the United States for the purpose of getting married [Ap. 143, 149-150]. The explanation given was that the Governor of the State could waive the requirement of residence [Ap. 143, 145, 148]. There is no evidence that these executive dispensations did not cover other requirements as to which Ruiz testified. It is a reasonable inference that they did, since, for example, it is highly improbable that the great number of United States citizens who were married in Tijuana in 1926 each complied with the requirement [Ap. 138-139] that the application for marriage must be signed by both

the father and mother of each contracting party, as well as by two witnesses who had known the parties for three years. As for the failure to find any record of the Olcotts' marriage, Ruiz admitted that he had not searched the records at Mexicali, where duplicate original records, equally valid, of Tijuana marriages were kept [Ap. 148]. Moreover, although Ruiz testified that in 1926 proxy marriages were not legal in Tijuana [Ap. 147], the American Consul General in Mexico advised the Deputy Commissioner that the Mexican Law Governing Family Relations of April 9, 1917, which was in effect in 1926 for the Federal District and Territory of Lower California (in which Tijuana is located), provided [Ap. 172]:

> "Article 3. On the day and hour designated for the performance of the marriage, there must be present before the Civil Judge, at the place the latter may have determined upon, the parties thereto, in person *or through a special representative legitimately appointed,* * * *" (Emphasis supplied.)

Since there was clearly sufficient evidence to sustain a finding that the Olcotts were legally married, the substance of appellants' argument is that their evidence as to the Mexican law completely rebutted the evidence establishing the marriage. However, the Mexican law and its application to the case was a question of fact to be determined by the Deputy Commissioner as the trier of fact. *Shapleigh v. Mier,* 83 F. (2d) 673, 676-677 (C. C. A. 5), affirmed, 299 U. S. 468. We submit that his finding is conclusive. *Cardillo v. Liberty Mutual Co.,* 330 U. S. 469, 477-478; *South Chicago Co. v. Bassett,* 309 U. S. 251, 257-258.

III.

Appellants Have Not Been Deprived of Their Property Without Due Process of Law.

Appellants' concluding argument is "that the refusal of the deputy commissioner and the lower court to require the claimant to show a legal marriage has deprived appellants of their property without due process of law" (Br. 22). As the basis for this argument appellants quote statements by appellee, the Deputy Commissioner, to the effect that if it were shown that the claimant and Mr. Olcott went to a Mexican office where people were getting married, went through a marriage ceremony and received a certificate of marriage, he "would not assume jurisdiction here to determine whether those formalities sufficiently complied with Mexican law" [Br. 21-22; Ap. 134-136]. Whatever the Deputy Commissioner may have said during the hearings, the fact remains that he admitted the expert testimony as to the Mexican law offered by appellants, and after the hearings he made an extensive inquiry into the Mexican law relating to marriage and incorporated the results of his investigation in the record [Ap. 133-154, 158-174]. Obviously he would not have made such an investigation if he had not intended to consider the Mexican law in making his findings. Appellants' contention that the claimant was not required to show a legal marriage is merely another way of arguing that evidence of a ceremony of marriage followed by more than eighteen years of cohabitation as husband and wife is not *prima facie* proof of a valid marriage under Cali-

fornia law. But, as we have shown in the discussion of the preceding point, such evidence is sufficient to establish a valid marriage.

In so far as appellants may now be seeking to do anything more than challenge the sufficiency of the evidence to sustain the findings, they are raising a contention which was never presented to the District Court for decision. Their libel charges only that the award is not in accordance with law in that there is no evidence sufficient to sustain the finding that Walter Olcott was the husband of Cora E. Olcott [Ap. 48], and the motions filed by appellants do not present the contention which they now raise [Ap. 210-211]. Objections to alleged erroneous rulings by the Deputy Commissioner should have been presented for review by the District Court. Having failed to raise this question in the court below, appellants may not raise it now on appeal. *Lumbermen's Mut. Casualty Co. v. McIver,* 110 F. (2d) 323 (C. C. A. 9), certiorari denied, 311 U. S. 655; *Hawaii Consol. Ry. v. Borthwick,* 105 F. (2d) 286 (C. C. A. 9).

Conclusion.

For the foregoing reasons, it is respectfully submitted that the decree of the court below dismissing the libel was proper and should be affirmed.

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